

## APPEAL NO. 970349

On January 28, 1997, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the respondent's (claimant) (date of injury), injury includes a compensable aggravation of the claimant's bilateral avascular necrosis; (2) whether a subsequent injury is the sole cause of the claimant's "current injuries"; and (3) whether the claimant has had disability. The appellant (carrier) requests review of the hearing officer's decision that the claimant's (date of injury), injury does include a compensable aggravation of the claimant's bilateral avascular necrosis and that the claimant has had disability beginning on November 15, 1996, and continuing through the date of the CCH. There is no appeal of the hearing officer's decision that a subsequent injury is not the sole cause of the claimant's current injuries. The claimant requests affirmance.

## DECISION

Affirmed.

The claimant testified that he started working for the employer on April 19, 1995, and that he did general maintenance work. On May 24, 1995, the claimant tripped and hit his right hip on a step. (Dr. M) saw the claimant at an emergency room (ER) on May 24, 1995, and diagnosed a right hip contusion. (Dr. B) reported that x-rays of the claimant's pelvis taken on May 24, 1995, showed a flattening of the right femoral head and cortical discontinuity with lucency within the right femoral head secondary to aseptic necrosis, stage IV, and mottling in the left femoral head, which Dr. B stated may also be a manifestation of aseptic necrosis. Contrary to the carrier's assertion, there is no mention by Dr. B of any "collapse" of the right or left femoral head in his x-ray report. There is also no mention of a collapse of the right or left femoral head in Dr. M's reports of May 24 and 25, 1995. The claimant was advised by the hospital to see (Dr. H). The claimant's testimony was somewhat confusing as to whether he saw Dr. H prior to his injury of (date of injury), but he eventually testified that he did not think he had. No records or reports from Dr. H are in evidence which are dated prior to May 3, 1996. The claimant said that his right hip pain from the May 24, 1995, accident resolved within two or three days of his accident of May 24, 1995, and he returned to his regular work duties, which, he said, included heavy lifting. He said that from the time his contusion resolved until (date of injury), he did not have problems with his hips.

The claimant testified that on (date of injury), he was working for the employer moving furniture, including a wall section, from one warehouse to another warehouse and that he felt sharp pain in his back and hips when he lifted the wall section. He went to the ER on April 23, 1996, and the ER report reflected that the claimant complained of pain in his back and hips and Dr. M diagnosed an acute back strain. The parties

stipulated that the claimant sustained a compensable injury on (date of injury). The carrier contends that the compensable injury is limited to a back strain. The claimant contends that the compensable injury of (date of injury), also includes an aggravation of a preexisting bilateral avascular necrosis condition with bilateral collapse of the femoral heads. Contrary to the carrier's assertion, the ER report of April 23, 1996, clearly states that x-rays of the claimant's back and hips were requested at that time.

On May 3, 1996, Dr. H wrote that the claimant complained of low back pain from lifting about a week before the visit and that x-rays of the claimant's hips showed a very severe collapse of large cystic formations in both femoral heads. Dr. H does not state the date of the x-rays he reviewed on May 3rd. The carrier speculates that Dr. H's diagnosis of a collapse of both femoral heads is based on the x-rays of May 24, 1995; however, as previously noted, there is no mention of a collapse of the femoral heads in the report of the May 24, 1995, x-rays. And, we note that the ER report of April 23, 1996, requested that back and hip x-rays be done. Dr. H further stated that "I suspect he has an avascular necrosis of the femoral heads and with heavy lifting got a complete collapse on the right hip with perhaps some collapse that we can't visualize yet on the left." Dr. H also stated that "I have no specific explanation for the etiology, but I think his pain is coming directly from both hips." Dr. H suggested that the claimant is going to need bilateral total hip replacements. The claimant said that he continued to work for the employer after his injury of (date of injury), but that he only did light lifting after that date, including light lifting when moving furniture with the help of others. The claimant's supervisor said that the claimant continued to do the same type of work after (date of injury), as he had done before that date. On June 28, 1996, Dr. H wrote that "I absolutely believe that this man [claimant] has an ongoing problem of avascular necrosis but had been quite functional and able to ambulate well until lifting the heavy object when he had a compression or a collapse of cystic formations in the head" and on July 22, 1996, wrote "I think this man [claimant] had both a lumbar sprain and a collapse of the femoral head from heavy lifting. . . ." Dr. H noted that x-rays taken on August 27, 1996, showed cystic formations in both hips which had begun to collapse.

The claimant testified that he stepped down off a ladder at work on or about September 1, 1996, and jarred his back and hips. (Dr. L) examined the claimant at the ER on September 4, 1996, and diagnosed an acute lumbosacral strain. The claimant said that he was terminated from his employment on September 26, 1996, and was told that his position had been eliminated. The employer's president and the claimant's supervisor testified that the claimant was terminated from employment because of attendance problems, lying regarding his whereabouts during work time, and failing to do his job. The employer's president said that on the day the claimant was terminated he saw the claimant walking without difficulty. The claimant said that his condition has gotten worse since his termination and that he has not worked nor has he been able to work since then. On October 17, 1996, Dr. H wrote that the claimant continued to have

pain in his back and hips and that the claimant has "bilateral avascular necrosis of the femoral heads with collapse," and on November 15, 1996, wrote that the claimant was to remain off work until the next appointment.

Dr. H also wrote on November 15, 1996, that up until a few months prior to that date the claimant had continued to work against his advice and that he was surprised that the claimant had been able to work. He also stated that the avascular necrosis had been present for a while, but had not been symptomatic "until his lifting"; that the claimant's visit to the ER in September 1996 did not represent a new injury; that the claimant and ER doctor assumed that the claimant's pain was coming from the claimant's back, but that he, Dr. H, continued to believe the pain was from the claimant's hips; and that he believed that the claimant's hip pain was a direct result of the claimant's heavy lifting. On December 3, 1996, Dr. H wrote that the claimant has been unable to work "due to vascular necrosis and collapse of the femoral heads due to an injury. (Date, 4/22/96). Until recently, he was attempting to work. He is now totally disabled due to the hip pain."

(Dr. C) examined the claimant at the carrier's request on December 3, 1996. Dr. C indicated in his report that a few days after the claimant's injury of (date of injury), x-rays were taken at the ER, which, again, is contrary to the carrier's assertion that x-rays were not taken at that time. Dr. C wrote that x-rays of the claimant's pelvis done in 1991 were within normal limits and showed no evidence of avascular necrosis and that the x-rays of the claimant's pelvis taken on May 24, 1995, showed "very early changes in the femoral head without any real collapse, although there is a slight cortical irregularity laterally, but there is no actual collapse that has occurred at that time that these films were taken." Dr. C's review of the x-rays of May 24, 1995, directly contradicts the carrier's assertion that those x-rays showed a collapse of the femoral heads. Dr. C further stated that the x-rays of October 17, 1996, showed avascular necrosis of the femoral heads bilaterally with collapse of the superior cortex bilaterally, right worse than left. Dr. C opined that the claimant would, at some point, require hip replacements. With regard to the claimant's hip problems Dr. C wrote:

What we have to rely upon here is what he was capable of doing, and evidently, he was performing his job without difficulty, and if this can be substantiated by his employer and fellow employees, then one is going to have to look very hard at the fact that his accident of 4/22/96 aggravated a pre-existing problem that was asymptomatic, and I strongly suspect that what occurred was with the lifting episode, he not only injured his back, but the femoral head collapsed under that extra weight, and that is the reason the hips became symptomatic, even though the avascular necrosis was present, there was probably no collapse of the cortex until that lifting incident, and this would explain why he was able to perform asymptotically up to that

episode, so the important point is to verify that he was asymptomatic and that he was able to do his job prior to the injury on 4/22/96.

It is undisputed that the claimant had an avascular necrosis condition prior to his injury of (date of injury). With regard to the issue of whether the claimant's injury of (date of injury), includes a compensable aggravation of the claimant's bilateral avascular necrosis, we stated in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, that "an aggravation of a pre-existing condition is an injury in its own right." We also stated in that decision that merely asserting an aggravation does not carry the claimant's burden of proof and that what must be proven is some enhancement, acceleration, or worsening of the underlying condition from the injury. We also noted in Appeal No. 94428 that whether there has been an aggravation is generally a question of fact. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. In the instant case, the medical evidence shows that prior to the injury of (date of injury), the claimant had avascular necrosis of the femoral heads and that the heavy lifting he did on (date of injury), caused the femoral heads to collapse. The claimant's testimony together with the medical opinions of Drs. H and C provide sufficient evidence to support the hearing officer's findings that prior to the (date of injury), injury, the claimant's bilateral avascular necrosis was asymptomatic; that the claimant's lifting at work on (date of injury), accelerated or worsened the claimant's preexisting bilateral avascular necrosis; and that the claimant's current injuries are caused in part by the preexisting bilateral avascular necrosis and the compensable injury of (date of injury). These findings are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer's findings support her conclusion that the claimant's compensable injury of (date of injury), includes a compensable aggravation of the claimant's bilateral avascular necrosis.

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). The hearing officer found that, due to the compensable injury, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage beginning on November 15, 1996, and continuing through the date of the CCH. The claimant's testimony and Dr. H's reports regarding the claimant's off-work status due to the compensable injury provide sufficient evidence to support the hearing officer's finding on disability. That finding supports the hearing officer's conclusion that the claimant has had disability from November 15, 1996, and continuing through the date of the CCH. Although there is some evidence that the claimant was terminated for cause on September 26, 1996, we have held that such does not preclude a finding that a claimant sustained disability after the termination, provided that the claimant proves that his

inability to obtain and retain employment at wages equivalent to the preinjury wage is because of the compensable injury. See Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992.

The hearing officer's decision and order are affirmed.

---

Robert W. Potts  
Appeals Judge

CONCUR:

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

---

Susan M. Kelley  
Appeals Judge